Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1993

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VIGGO THOR BRANDT-ERICHSEN,
Petitioner

V.

UNITED STATES DEPARTMENT OF INTERIOR,
et al.,
Respondents

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Petition for Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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Scott A. Brandt-Erichsen
P.O. Box 110365
Anchorage, Alaska 99511
(907) 343-4545

Attorney for Petitioner

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## STATEMENT OF THE ISSUES

1. Whether the court erred when it deferred to an administrative agency's interpretation and application of a federal statute when this Court has previously held that the statute in question, when applicable, removes the subject from the agency's jurisdiction.

2. Whether the court erred when it held that a challenge to an administrative agency's subject matter jurisdiction is waived if not raised before that agency when:

   A. The agency lacks authority to determine whether it has subject matter jurisdiction over the claim; and

B. Even if the agency had authority to hear the claim, it would have been futile to raise the issue before the agency?

## LIST OF PARTIES

Viggo Thor Brandt-Erichsen,

Plaintiff-Petitioner,

v.

United States Department of Interior, Bureau of Land Management; United States Department of Interior, National Parks Service; Manuel Lujan in his official capacity as Secretary of Interior; Charles Budge in his official capacity as Superintendent of the Wrangell-St. Elias National Park; Richard Martin in his official capacity as Superintendent of Wrangell-St. Elias National Park; William P. Horn, Deputy Secretary of the Department of Interior in his official capacity; John Tiffany, Inspector for the Bureau of Land Management, Glennallen Detachment, in his official capacity; and Stuart Hirsch, Inspector for the Bureau of Land Management in his official capacity,

Defendants-Respondents.

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## OPINIONS

The United States District Court for the District of Alaska issued an unpublished opinion in the case on May 30, 1991. (Appendix at 1-16). The United States Court of Appeals for the Ninth Circuit issued a decision on the appeal on July 15, 1993. (Appendix at 17-67). A petition for rehearing was filed on July 24, 1993. That petition for rehearing was denied by order dated March 4, 1994. (Appendix at 68-69).

## STATEMENT OF JURISDICTION

The decision sought to be appealed was issued on July 15, 1993. A petition for rehearing was timely filed on July 24, 1993 and was denied on March 4, 1994. This Court has jurisdiction to review this matter on certiorari pursuant to 28 U.S.C. § 2101(c).

This case was initiated as a quiet title action in which District Court jurisdiction was established under 28 U.S.C. § 2409(a). The venue was proper under 28 U.S.C. § 1402(d). The appeal to the Ninth Circuit Court of Appeals was an appeal of right under 28 U.S.C. §§ 1291, 1294.

## STATUTES RELIED UPON

43 U.S.C. § 1165

Suspension of entries for correction of clerical errors; patents

Whenever it shall appear to the Commissioner of the General Land Office [Secretary of Interior] that a clerical error has been committed in the entry of any public lands such entry may be suspended, upon proper notification to the claimant, through the local land office, until the error has been corrected; and all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment have been made and certificates issued, and to which there have been no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day

of March, eighteen hundred and eighty-eight, and after final entry, to bona-fide purchasers, or incumbrancers, for a valuable consideration, shall unless upon investigation by a Government Agency, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance: Provided, that after the lapse of two years from the date of the issuance of the receipt of such officer as the Secretary of Interior may designate upon final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying

the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before issuing a patent therefor.

## STATEMENT OF THE CASE

In 1968 Viggo Thor Brandt-Erichsen (Thor), entered upon approximately 80 acres of land for the purpose of establishing a trade and manufacturing site under 43 U.S.C. § 687(a) and, thereby, obtaining title to the land. On August 9, 1968 Thor executed and delivered to the Bureau of Land Management (BLM) a Notice of Location of Settlement or Occupancy Claim for the land. CR 28 at 11-14. With this Notice of Entry, Thor paid the required fee and obtained a receipt. CR 28 at 2, R at 22 and 26.

On August 6, 1973, Thor filed an Application to Purchase Trade and Manufacturing (T and M) Site and Petition for Survey. CR 28 at 51-80, R at 19, 22 and 26. With this application Thor

submitted the required application fee for the patent and survey, obtaining a receipt therefor. CR at 1, R at 19, 22 and 26.

On January 18, 1979, five years and five months after Thor filed his Application to Purchase and Petition for Survey, paid the fees then due, and obtained a receipt for those fees, the BLM filed a complaint contesting Thor's application for patent. CR 28 at 197-98. On December 12, 1979, an administrative law judge granted the BLM's contest on the grounds that at the time he applied to purchase the tract in 1973 he was not engaged in business operations from which he would derive a profit. At this hearing there was no discussion of 43 U.S.C. § 1165. The administrative law judge's opinion was affirmed by the

Interior Board of Land Appeals. Thor continued, and still continues, to enjoy uninterrupted use of the property under a claim of ownership.

In May 1989, after receiving a letter directing him to leave the property, Thor filed the present action for quiet title under 28 U.S.C. § 2409a in the District Court asserting title by operation of 43 U.S.C. § 1165. In November 1990 both Thor and the defendants moved for Summary Judgment. On May 8, 1991, the District Court granted summary judgment in favor of defendants. Thor appealed to the United States Court of Appeals for the Ninth Circuit. In a divided opinion the Ninth Circuit affirmed the District Court decision on July 15, 1993. A petition

for rehearing was filed on July 24, 1993 and denied on March 4, 1994.

One of the Justices determined that 43 U.S.C. § 1165 became ambiguous when it was amended in 1946 and, based upon the theory that the 1946 amendment injected ambiguity, deferred to the interpretation of that section offered by the Department of Interior. One of the Justices, relying on this Court's decision in Stockley v. United States, 260 U.S. 532 (1923), held for plaintiff and ruled that 43 U.S.C. § 1165 made Congress' intent clear that the passage of two years from the date of final entry compelled issuance of a patent. The third justice held that plaintiff had waived the right to assert title by operation of 43 U.S.C. § 1165 by failing to assert the argument

in front of the agency in the 1979 administrative adjudication.

## ARGUMENT

This petition for certiorari falls within the scope of those matters described in Supreme Court Rule 10.1(c) where a United States Court of Appeals has decided an important federal question in a manner which conflicts with applicable decisions of this Court. In particular, this case is about an administrative agency overreaching its powers and interpretation of a statute which was adopted to curb agency abuses.

In the 1880's and early 1890's the Land Department came under criticism for sitting on and delaying the processing of homestead and other land entries. Congress responded to this abuse of agency authority by enacting what is now 43 U.S.C. § 1165 as a limitation on the authority of the Land Department to delay

or challenge entries. Over time the Land Department reverted to its ways somewhat and interpreted 43 U.S.C. § 1165 in a way which limited the rights Congress conferred on an entryman by that statute.

In a series of decisions between 1917 and 1923 this court addressed issues of interpretation of this statute ending with the seminal case Stockley v. United States, 260 U.S. 532 (1923). In Stockley this Court held that the intent of Congress in adopting the statute was clear. In the years since Stockley the Land Department, now Department of Interior, has once again reverted to its pattern of trying to administratively distinguish this statute and thereby frustrate both the clear intent of Congress and the authoritative rulings of this Court.

1. The court erred when it deferred to the Department of Interior's interpretation and application of 43 U.S.C. § 1165 because this Court has previously held that this statute, when applicable, removes the subject from the agency's jurisdiction.

Judge Poole, who wrote an opinion which became the majority position[1], found that 43 U.S.C. § 1165 was ambiguous and therefore deferred to the interpretation of that statute offered by the Department of Interior. Judge Poole erred in two ways, first because the statute was not ambiguous, and second because, even if it were ambiguous, deference to the Department of Interior was not justified in this case.

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[1] Judge Hug dissented and adopted the position put forward by appellant. Judge Ferguson concurred in the result, but wrote a separate opinion offering a different reason for his concurrence in the result.

This Court has held that "[t]he starting point for interpreting a statute is its language, for if the intent of Congress is clear, that is the end of the matter." Good Samaritan Hospital v. Shalala, 508 U.S.____, 124 L.Ed.2d 368, 378 (1993). This Court held the intent of Congress in enacting 43 U.S.C. § 1165 to be clear and unambiguous. In Stockley v. United States this Court wrote:

> "We are not at liberty to add to or to take away from the language of the statute. When Congress has plainly described the instrument from whose date the statute begins to run as the 'receipt upon final entry', there is no warrant for construing it to mean only a receipt issued simultaneously with a certificate, or one issued after adjudication on the final proof, which might be - and in this instance was - postponed indefinitely." Stockley at 540.

In spite of this Court's prior authoritative ruling on the issue of what receipt begins the two year period under the statute, Judge Poole held that 43 U.S.C. § 1165 was rendered ambiguous on this precise issue by a 1946 amendment which replaced the wording "receiver's receipt upon final entry" with the words "receipt of such officer as the Secretary may designate upon final entry."[2] Based upon this finding of ambiguity, Judge Poole deferred to the interpretation of 43 U.S.C. § 1165 offered by the Department of Interior. Contrary to Judge Poole's assertion, the amendment in question is clearly technical in nature, with no intent to alter the workings of

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[2] The 1946 amendment was made as part of the reorganization which created the Department of Interior's Bureau of Land Management. 1946 Reorganization Plan No. 3, § 403, 60 Stat. 1100.

section 1165. The statutes' reference to "receiver" was merely updated to reflect the changed organization of the agency. However, the fact that the remainder of the statute was left intact indicates that Congressional intent not to interfere with the rights created by section 1165.

Apart from the facial conflict between this Court's decision in Stockley and Judge Poole's finding of ambiguity, deference to an agency interpretation in these circumstances is contrary to the decisions of this Court. The 1946 amendment did not change the operative terms in that portion of the statute. Both before and after the 1946 amendment the two year period was triggered by the "receipt upon final entry" regardless of the title of the individual charged with

issuing the receipt. Obviously the receipt issued to an entryman when he makes his final entry, presents his proofs and submits the fees then due will be issued by an officer designated by the Secretary of Interior. The failure to specify the title of the officer does not inject ambiguity or create a gap in the statute which requires agency interpretation. In Adam Fruit v. Barrett, 494 U.S. 638, 649-650, 108 L.Ed.2d 585 (1990), this Court held that gap in a statute justifying deference to an agency interpretation is not created merely because a statute does not restate a truism.

Even if the statute were ambiguous the court need not defer to the Secretary of Interior's interpretation of 43 U.S.C. § 1165. Congress explicitly provided

that the judiciary was the adjudicator of private rights of action arising under this statute. See Payne v. U.S. ex rel Newton, 255 U.S. 438, 444 (1921) where this Court held that "the effect of section 1165 is to transfer from the land officers to the regular tribunals the authority to deal with any subsequent controversy over the validity of the entry."

This Court wrote in Adam Fruit Co. "[a] precondition to deference under Chevron [USA v. Natural Resources Defense Council, 467 U.S. 837, 81 L.Ed.2d 694 (1984)] is a Congressional delegation of administrative authority. Bowen v. Georgetown University Hospital, 488 U.S. 204, 102 L.Ed.2d 493 (1988)." Adam Fruit Co. at 649. See also Crandon v. U.S., 494 U.S. 152, 177, 108 L.Ed.2d 132 (1990)

Justice Scalia concurring rejecting Chevron deference where the statute is not administered by any agency but by the courts. "An agency may not bootstrap itself into an area in which it has no jurisdiction." Adam Fruit Co. at 650. See also Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 36 L.Ed.2d 1773 (1973); S.E.C. v. Sloan, 436 U.S. 103, 119, 56 L.Ed.2d 148 (1978); Adamo Wrecking Co. v. U.S., 434 U.S. 275, 288 n. 5, 54 L.Ed.2d 538 (1978). Here, pursuant to this Court's ruling in Payne, the Department of Interior is without authority to interpret 43 U.S.C. § 1165.

Therefore the Ninth Circuit erred when it 1) found the intent of Congress in enacting 43 U.S.C. § 1165 to be ambiguous, despite this Court's opinion in Stockley, and 2) deferred to the

Secretary of Interior to clarify the perceived ambiguity when this Court has held that 43 U.S.C. § 1165 deprives the agency of jurisdiction.

2. The court erred when it held that the rights of an entryman under 43 U.S.C. § 1165, which amount to a challenge to the Department of Interior's subject matter jurisdiction, are waived if not raised before the Department of Interior in an administrative adjudication because:
   A. The Department of Interior lacks authority to determine whether it has subject matter jurisdiction over adjudication of rights conferred by section 1165; and
   B. Even if the Department of Interior had authority to hear a claim asserting rights under section 1165, it would have been futile to raise the issue before the agency.

In his concurring opinion, Judge Ferguson concluded that Thor had waived his right to assert the protections of 43 U.S.C. § 1165 by failing to raise the argument before the administrative law judge in the proceedings brought by the Bureau of Land Management in 1979 challenging his compliance with the trade and manufacturing site requirements. Mr. Brandt-Erichsen asserts that this conclusion was in error because the failure to assert a claim before an agency which lacks subject matter jurisdiction over the claim cannot form the basis for a waiver. Further, even if the agency may consider a claim under section 1165, as past agency decisions indicated, it would have been futile to assert the claim before the agency and so exceptional circumstances exist which

warrant consideration of the issue by the Courts.

A. The Department of Interior lacks authority to determine whether it has subject matter jurisdiction over adjudication of rights conferred by section 1165.

43 U.S.C. § 1165 is a statute which is jurisdictional in nature. As this Court wrote in Payne v. U.S. ex rel Newton, 255 U.S. 438, 444 (1921) "the effect of section 1165 is to transfer from the land officers to the regular tribunals the authority to deal with any subsequent controversy over the validity of the entry." Thus 43 U.S.C. § 1165 deprives the Department of Interior of the ability to address or contest an entry in an administrative forum. See also Lane v. Hoglund, 244 U.S. 174 (1917), (proceedings to test validity of

an entry are barred if not initiated within two years).

Once the requisite two year time limit passes, jurisdiction over the validity of the entry rests solely with the courts. As a result, any agency finding regarding the events which trigger section 1165 is in reality a determination of whether federal court jurisdiction has been established. Such a finding cannot be conclusive[3], and so failure to raise a section 1165 claim could not have constituted a waiver of such a claim. See section 83(4)(b) Restatement of Judgments (Second).

B. Even if the Department of Interior had authority to hear a claim asserting

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[3] See Reid v. Engen, 765 F.2d 1457, 1461 (9th Cir. 1985) ("we may decide an issue not raised in an agency action if the agency lacked either the power or the jurisdiction to decide it").

> rights under section 1165, it would have been futile to raise the issue before the agency.

Judge Ferguson concluded below that Thor had waived his claim under section 1165 because he failed to assert such a claim during the initial administrative contest over the validity of his entry. However, failure to raise a claim with an administrative agency does not result in a waiver of that claim when exceptional circumstances exist. See Com. of Mass., Dept. of Public Welfare v. Secretary of Agriculture, 948 F.2d 514, 524 (1st Cir. 1993), reh. den. ("As a general matter, however, courts will not entertain an issue that the parties failed to raise in the proper administrative venue unless the issue is jurisdictional in nature or some other compelling reason exists.")

Marathon Oil v. U.S., 807 F.2d 759, 768 (9th Cir. 1986) cert. denied 480 U.S. 940, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987) (Court may decide issue over which an agency has jurisdiction when exceptional circumstances warrant such review, despite failure to present the issue to the agency).

Such "exceptional circumstances" include where pursuit of administrative remedies would be a futile gesture. Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 500-01 (9th Cir. 1980); Pence v. Kleppe, 529 F.2d 135, 149 (9th Cir. 1976); Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle, 571 F.2d 359, 363 (7th Cir. 1978) cert. denied 439 U.S. 834, 99 S.Ct. 115 (1978).

Based on past agency decisions, it would have been futile for Thor to assert

a claim under section 1165 before the agency. Appellees acknowledged that claimants to public lands in Alaska had been raising "such arguments" before the agency since at least 1976. (Appellees' brief before the 9th Circuit at 21.) Contrary to Judge Ferguson's assertion below, by the time of the administrative proceedings in question, the agency's mind was set against appellant's position. Prior to the decision in Grewell v. Watt, 664 F.2d 1380 (9th Cir. 1982), the agency disputed the application of section 1165 to land claims in Alaska. In 1980 it would have been futile to ask the agency to apply section 1165 to an Alaska land claim, let alone ask the agency to reverse its interpretation of what constituted a "receiver's receipt."

## CONCLUSION

Administrative agencies are created to carry out the will of Congress. However, they often develop an agency culture which is contrary to the Congressional intent and attempt from time to time to disregard or attempt to find ways around the clear limitations on their authority. Such is the case with the Department of Interior and delays in processing claims for public land. In the late 1800's they stalled on claims and avoided issuing patents. Congress responded by passing a statute giving them two years from the entryman's completion of his obligations to challenge an entry or lose the jurisdiction to do so.

In the period from 1910-1923 the agency quibbled and delayed arguing that

the "receiver's receipt" upon final entry had to be a certificate issued by the register, a document which would only be issued after adjudication on the proofs submitted on final entry. This Court put the agency in its place with the decision in Stockley recognizing the clearer intent of Congress that the two year period runs from the date when the entryman has submitted his final proofs and thereby made his final entry.

Now the Department of Interior has convinced a lower tribunal that a change in the labels used in section 1165 caused by the 1946 reorganization of the Department of Interior justifies departure from this Court's clear ruling and the intent of Congress. This Court should not condone such usurpation of authority by an administrative agency.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF ALASKA**

| | | |
|---|---|---|
| VIGGO THOR BRANDT-ERICHSEN, Plaintiff, | : | No. A89-183 CV |
| v. | : | |
| UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants. | : | |

**JUDGMENT**

This case came before the undersigned judge on cross-motions for summary judgment, which were heard May 2, 1991. Defendants' motions were granted, and plaintiff's motion was denied. The motion for consolidation, previously made, was reconsidered in light of the rulings and granted on the undismissed count. A motion for a judgment pursuant to Federal Rule of Civil Procedure 54(b)

was granted, because the matter consolidated with the Juneau case was entirely distinct, and justice required that prompt appeal be available to the plaintiff on the matters decided.

It is hereby ordered and adjudged that the first and third claims be dismissed, that plaintiff take nothing on those claims, and that defendants take costs against plaintiff. It is further ordered that plaintiff's second claim for relief be consolidated with the case entitled State of Alaska v. USA, J87-012 CIV, in the Fifth United States District Court of the District of Alaska at Juneau.

May 8, 1991.

Andrew J. Kleinfeld, Judge

cc: Judge Von der Heydt
J87-012 Civil
S. Brandt-Erichsen
D. Dunsmore (AUSA)
O & J 4104

THE COURT: My resolution of the issues is as follows:

First of all, I conclude that 43 U.S.C. § 1165 entitles the person who has satisfied its criteria to equitable title and not merely mandamus. The language is, When there shall be no pending contest or protest against the validity of such entry - or provided that after the lapse of two years from the date of the issuance of the receiver's receipt, and when there shall be no pending contest, the entryman shall be entitled to a patent. The only reason that he'd be entitled to a patent is that he has already satisfied all the prerequisites for obtaining a patent at that point, which means that he has full equitable title but not legal title.

I think that this reading is more in accord with the authorities than the reading urged by the Government. I would particularly note that in Stockley v. United States, 260 U.S. 532, at page 537, the phrase, quote "full equitable title," closed quote is used to describe the entryman's interest. In Paine v. United States, ex rel. Newton, 255 U.S. 438, at page 444, the Supreme Court uses the phrase, quote "It is intended that he shall be clothed with the legal title instead of an equitable title only," closed quote. In Gruell, G-r-u-e-l-l, v. Watt, 664 F.2d 1380, at page 1382, the Ninth Circuit Court of Appeals says, at Footnote 1, that the confirmation statute is not merely a statute of repose but permits an entryman to ground affirmative rights on its language.

(Pause)

THE COURT: This is more consistent with an interpretation of the statute as creating equitable title than merely a right to mandamus, that is, a court order commanding a government official to perform a nondiscretionary duty.

(Pause)

THE COURT: In the cases which describe the right as a right to the issuance of a writ of mandamus, such as Lane v. Hoglund, H-o-g-l-u-n-d, 244 U.S. 174, and Armstrong v. Udahl, 435 F.2d 38, the theory for the mandamus appears to be that the power of the executive officers to deal with the matter has disappeared; there is no room for the exercise of judgment, but only a plain duty to see that the entryman receives a patent. I

can't see how that could be so unless the entryman has some vested property right.

(Pause)

THE COURT: And the next question is, Has there been a lapse of two years from the date of the issuance of the receiver's receipt upon final entry and no pending contest? The date that Brandt-Erichsen relies upon for his receiver's receipt --

(Pause)

THE COURT: Mr. Brandt-Erichsen has not provided the necessary factual predicate to establish that a receiver's receipt within the meaning of 43 U.S.C. § 1165 was ever issued. The declaration of Lori Fitzsimmons attached to the Government's summary judgment motion establishes that Mr. Brandt-Erichsen could have obtained what is now called a

manager's receipt within the administrative agency and serves as the receiver's receipt. The amount could be calculated. He applied for 80 acres; the price was $2.50 an acre. So the amount would be $200. He could have triggered operation of 11- -- § 1165 by tendering the $200 and obtaining a receipt for it.

I think that the case is distinguished from Stockley because in Stockley, the Court says, at page 540, quote,

> "Having submitted to the proper officials proof showing full compliance with the law, and having paid all the fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him."

Closed quote.

If I understand the Stockley case correctly, it was a rejection of the Government's claim that the proviso in § 1165 can never become operative, and the two-year period does not begin to run, until after the Department of the Interior passes upon the final proofs and decides that the entryman is entitled to a patent. The Department seems to have been reading the statute at that time only to protect an entryman against contests by third parties and not to protect the entryman against late contests by the United States.

(Pause)

THE COURT: The matter isn't as clear as it might be, but the summary of the briefs in the Stockley syllabus seems to support this interpretation.

(Pause)

THE COURT: Oh, one more authority I meant to mention regarding equitable title. I noticed that 63(a) Am. Jur.2d on Public Lands at § 69 says that the receiver's final certificate is evidence of equitable title to be perfected when a patent is issued. After an entryman has made his final proof, paid the amount of money required, and received a final certificate, he has a complete equitable title on the land with the naked legal title only remaining in the government.

Now, I think an implication of equitable title is that he has to have paid for it. And that is part of the reason that I interpret the receiver's receipt requirement as I do. It is hard to see how a person could have equitable title to land that had a purchase price where he hadn't paid for it. In private

purchases of land, when A buys land from B, once the money is paid, he has equitable title and a right to a conveyance. It may not be his own money; he may have borrowed it from a bank, which then has a lien or other security interest on the land. But the way that he gets equitable title is by doing all that he needs to do in order to be entitled to the passage of legal title.

The lack of issuance of a receiver's receipt means that Mr. Brandt-Erichsen never obtained the right to the issuance of a patent to the land. Had he tendered the purchase money, then it is plain, under the Gruell case, that the contest by the Department of the Interior would have been late, and had he filed an action in the district court within six years, his situation would have been

exactly analogous to Ms. Gruell's situation, and he would have been entitled to issuance of a patent. The apparently meritorious contest - or, apparently, meritorious grounds for the contest would be irrelevant because asserted late. That does not operate, though, without the receiver's receipt.

(Pause)

THE COURT: For this reason, the Government's motion for summary judgment is granted, and Mr. Brandt-Erichsen's motion for summary judgment is denied as to Claim I, Brandt-Erichsen's claim that he has equitable title to the 80 acres, pursuant to 43 U.S.C. § 1165.

With regard to Claim VI, the inverse condemnation claim, the Government's motion to dismiss is now granted for the reasons urged by the Government. It

appears that it would be futile, on its face, to transfer this claim to the Court of Claims. The lack of jurisdiction is not merely because the district court lacks jurisdiction over inverse condemnation claims in excess of $10,000 but because the - Mr. Brandt-Erichsen did not make it in a timely claim or show any entitlement to an interest.

The challenge to the regulations in Claim II is consolidated with the Juneau case. And that is the earlier filed case, so in accord with the usual practices of this Court, this later filed case is consolidated into it so that Mr. Brandt-Erichsen can be heard in the Juneau case. The Juneau case is -

MR. DUNSMORE: Your Honor, I can give you the caption and number of that case.

THE COURT: I think I have it. State v. United States, J87-012 Civil. Is that right?

MR. DUNSMORE: That is correct, Your Honor.

THE COURT: This case is ordered - the remaining claim in Claim II is ordered consolidated into State v. United Sates, J87-012.

Now that disposes of some but not all claims. Mr. Brandt-Erichsen, this is a very complicated area. I fully recognize the possibility that I may be in error, and if you think it is desirable, I will grant you a 54(b) judgment so that you can obtain immediate appeal without waiting for disposition of the Juneau case. But if you prefer not to appeal until the Juneau case is disposed of because you don't want to

incur the burden on your client of the appellate procedure if you may obtain his occupancy in the Juneau case, then I won't grant the 54(b) judgment and you'll be able to just wait until the Juneau case is disposed of. You can take your choice now, or if you'd rather think about it, you can have some time to file a status report saying which you prefer - or a motion or something.

MR. BRANDT-ERICHSEN: Your Honor, do I understand that to be as to Count II only?

THE COURT: Right.

MR. BRANDT-ERICHSEN: I'd prefer to take a few days to think about it.

THE COURT: All right. If there is - at this point, two of the three claims are dismissed, and one is ordered consolidated into another case. That is

not a disposition of all claims in the action. If either side seeks a 54(b) judgment, then a motion for a 54(b) judgment shall be filed within 10 days of today. Is that - that's enough time for you, isn't it?

MR. BRANDT-ERICHSEN: That would be fine, Your Honor.

Viggo Thor BRANDT-ERICHSEN,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT; United States Department of Interior, National Parks Service; Manuel Lujan, in his official capacity as Secretary of Interior; Charles Budge, in his official capacity as Superintendent of the Wrangell-St. Elias National Park; Richard H. Martin, in his official capacity as Superintendent of the Wrangell-St. Elias National Park; William P. Horn, Deputy Secretary of the Department of Interior in his official capacity; John Tiffany, Inspector for the Bureau of Land Management, Glennallen Detachment in his official capacity; Stuart Hirsch, Inspector for the Bureau of Land Management in his official capacity, Defendants-Appellees.

No. 91-35835.

United States Court of Appeals
Ninth Circuit.

Argued and Submitted Nov. 5, 1992.

Decided July 15, 1993.

Entryman sought patent on tract in national park and preserve. After the Interior Board of Land Appeals affirmed decision canceling his entry, entryman filed complaint alleging equitable title in tract. The United States District Court for the District of Alaska, Andrew J. Kleinfeld, J., entered summary judgment for government, and entryman appealed. The Court of Appeals, Poole, Circuit Judge, held that Interior Board of Land Appeals reasonably construed "confirmation statute" to require payment of entire purchase price before entryman could claim patent.

Affirmed.

Ferguson, Circuit Judge, specially concurred and filed opinion.

Hug, Circuit Judge, dissented and filed opinion.

Scott A. Brandt-Erichsen, Anchorage, AK, for plaintiff-appellant.

Apphia T. Schley and Andrea N. Ward, U.S. Dept. of Justice, Washington, DC, for defendants-appellees.

Appeal from the United States District Court for the District of Alaska.

Before: HUG, POOLE and FERGUSON, Circuit Judges.

POOLE, Circuit Judge:

Appellant Viggo Thor Brandt-Erichsen appeals the district court's summary judgment in favor of the appellees, the United States Department of the Interior's Bureau of Land Management and its employees, on the ground that Brandt-Erichsen failed to obtain a "receipt upon

final entry" triggering 43 U.S.C. § 1165 and therefore, did not obtain title to an 80-acre tract of land in Alaska. We affirm the district court's summary judgment.

## I. BACKGROUND

Sometime in 1968, Brandt-Erichsen entered an 80-acre tract of land in the Wrangell-St. Elias National Park and Preserve in Alaska. In August of that same year, Brandt-Erichsen filed a Notice of Location of Settlement or Occupancy Claim with the Bureau of Land Management. With the notice, Brandt-Erichsen paid the required recording fees and obtained a receipt.

In August 1973, Brandt-Erichsen filed an application to purchase the 80 acres as a trade and manufacturing site

and petitioned for a survey of the land with the Bureau of Land Management. He paid the required application fee for the patent and survey and obtained a receipt.

In January 1979, the Bureau of Land Management filed an administrative complaint contesting Brandt-Erichsen's request for a patent on the property. On December 12, 1979, an administrative law judge canceled Brandt-Erichsen's entry on the ground that at the time he applied to purchase the tract, Brandt-Erichsen was not engaged in business operations from which he would derive a profit. The administrative law judge's determination was affirmed by the Interior Board of Land Appeals.

In May 1989, Brandt-Erichsen filed a complaint in district court. In his

second cause of action, Brandt-Erichsen claimed equitable title to the 80 acres under 43 U.S.C. §§ 1165 and 687a.

In November 1990, both Brandt-Erichsen and the appellees filed summary judgment motions. On May 8, 1991, the district court granted summary judgment in favor of the appellees on Brandt-Erichsen's second cause of action. The court decided that: (1) 43 U.S.C. § 1165 entitled a person who satisfied its criteria to equitable title, and (2) Brandt-Erichsen failed to satisfy its criteria as he did not pay the entire purchase price and obtain the receiver or manager's receipt. The court entered final judgment as to the section 1165 issue under Fed.R.Civ.P. 54(b).

Brandt-Erichsen filed a timely notice of appeal with this court. We have jurisdiction over the appeal under 28 U.S.C. §§ 1291, 1294.

## DISCUSSION

### A. SUMMARY JUDGMENT.

[1,2] A grant of summary judgment is reviewed de novo. Jones v. Union Pac R.R., 968 F.2d 937, 940 (9th Cir.1992); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir.1987). Viewing the evidence in the light most favorable to the nonmoving party, we must decide whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. FDIC v. O'Melveny & Meyers, 969 F.2d 744, 747 (9th Cir.1992); Tzung v. State Farm

Fire & Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir.1989).

Brandt-Erichsen contends that the district court erred by granting summary judgment in favor of the appellees on the ground that he failed to obtain a "receipt upon final entry" for purposes of 43 U.S.C. § 1165. He argues that the receipts he obtained for payment of fees in connection with his application to purchase land under 43 U.S.C. § 687a constituted a "receipt upon final entry" triggering the two-year statutory period. Because the Bureau of Land Management failed to object within the two-year period, Brandt-Erichsen asserts that he has equitable title to the land. The appellees disagree and argue that Brandt-Erichsen was required to pay the purchase price for the land before obtaining a

"receipt upon final entry" and triggering the statute. The problem before us is to determine what constitutes "final entry" within the meaning of the statute.

1. The Statutes.

[3] Congress passed what is now known as the Confirmation Statute. 43 U.S.C. § 1165, as part of a 1891 "Act to repeal timber-culture laws, and for other purposes." 26 Stat. 1095. Section 7 of the 1891 Act read:

> [A]fter the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him...

26 Stat. 1099 (Emphasis Added). This section now 43 U.S.C. § 1165, placed an affirmative restriction on the Commissioner of the General Land Office, now the Secretary of the Interior, to contest the rights of an entryman to a patent in a timely fashion. See Grewell v. Watt, 664 F.2d 1380, 1382 (9th Cir.1982).

Congress enacted what today is section 687a as part of a 1898 "Act extending homestead laws...in the District of Alaska." 30 Stat. 409. As enacted, this section stated:

> [A]ny citizen of the United States...in the possession of and occupying public lands in the District of Alaska in good faith for the purposes of trade, manufacture, or other productive industry may...purchase one claim...not exceeding eighty acres of such land..., at two dollars and fifty cents per acre, upon submission of

> proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry...

Id. With the exception of the deletion of the words "District of," this section has remained unchanged since the time of its enactment. See 43 U.S.C. § 687a.

Although section 1165 was enacted as part of the 1891 Act and section 687a as part of the 1898 Act, we have held that Congress intended section 1165 to apply to claims under section 687a. Grewell. 664 F.2d at 1384.

2. Statutory Construction.

[4] Judicial review of an agency's construction of a statute that it administers is a two-part process. Chevron U.S.A. v. Natural Resources

Defense Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). First, we examine "whether Congress has directly spoken to the precise question at issue." Id. If the intent of Congress is clear, then we must give effect to that intent. Id. at 842-43, 104 S.Ct. at 2781-82. Second, if we determine that Congress has not directly addressed the precise question at issue, then we must decide whether the agency's interpretation is a permissible construction of the statute. Id. at 843, 104 S.Ct. at 2782.

a. Congress' Intent.

[5] Congress did not expressly define the phrase "receipt upon final entry" as found in 43 U.S.C. § 1165. In a series of decisions, the Interior Board of Land

Appeals ("IBLA")[4] has interpreted the phrase to require an entryman to comply with the requirements for a patent application and to pay the entire purchase price of the land. For the reasons that follow, I do not believe that Congress' intent in using this phrase is clear.

At the time Congress passed the Confirmation Statute, an entryman simultaneously received a receiver's receipt, indicating submission of final proof and payment of required moneys, and a register's certificate, indicating

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[4] The Interior Board of Land Appeals is part of the Office of Hearings and Appeals which is a component of the Office of the Secretary of the Interior. It is authorized to hear, consider, and determine matters within the jurisdiction of the Department of the Interior involving hearings, appeals, and other review functions of the Secretary of the Interior. 43 C.F.R. § 4.1; see also United States v. Jones, 106 I.B.L.A. 230, 246 (1988).

approval of the proof and declaring the entryman entitled to a patent. 30 Stat. 414 (1898); see also Stockley v. United States, 260 U.S. 532, 538-39, 43 S.Ct. 186, 187-88, 67 L.Ed. 390 (1923). By 1908, the procedures of the Land Department changed, and the Department no longer issued receiver's receipts and register's certificates simultaneously. Stockley, 260 U.S. at 538, 43 S.Ct. at 187.

In reviewing the effects of this change on the meaning of "receipt of final entry," the Supreme Court, in Stockley, 260 U.S. at 543, 43 S.Ct. at 189, held that the receiver's receipt alone constituted a "receipt upon final entry." The Court explained that Congress created section 1165 to avoid delays of unreasonable lengths of time

between the time an entryman completed all the requirements of law and the time the agency adjudicated on the final proof. Id. at 540, 43 S.Ct. at 188. The Court noted that "[h]aving submitted to the proper officials proof showing full compliance with the law, and having paid all the fees and commissions lawfully due, [the entryman] had done everything which the law required on his part and became entitled to immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him. No subsequent receipt was contemplated or required." Id.

In 1946, however, 43 U.S.C. § 1165 was amended as a result of the creation of the Department of the Interior's Bureau of Land Management. 1946 Reorganization Plan No. 3, § 403, 60

Stat. 1100. The term "receiver's receipt upon final entry" was replaced by "receipt of such officer as the Secretary of the Interior may designate upon final entry." 43 U.S.C. § 1165 (historical note).

As this change centered on the language relied upon by the Court in Stockley, I cannot conclude that Congress intended to continue construing "receipt upon final entry" in the manner suggested by the dissent. The legislative grant of discretion to the Secretary of the Interior regarding the procedures for issuing the receipt has, at the least, made unclear the Congressional intent regarding what constitutes such receipt. I thus turn to the agency's interpretation of the statute.

b. Agency's Interpretation

[6] By the 1970's, when Brandt-Erichsen entered the 80-acre tract of land and filed his application to obtain a patent, the Bureau of Land Management had issued a number of regulations dealing with land patent applications. Under these regulations, the receiver and register had been replaced by a Bureau of Land Management Manager. 43 C.F.R. § 1862.6. The manager issued three different "receipts" to an entryman as part of the process to obtain land under 43 U.S.C. § 687a before issuing a final certificate. Id. The first receipt was issued after the entryman paid a $10 recording fee and filed a notice of location of claim. 43 C.F.R. § 2562.1(d); see also United States v. Bunch, 64 I.B.L.A. 318, 324

(1982), aff'd sub nom, Bunch v. Kleppe, Civ. No. A76-115 (D.Alaska Jan. 14, 1983). The second receipt was issued when the entryman paid a $10 service fee and submitted the proofs for application of a patent. 43 C.F.R. § 2562.3(b). A final receipt was issued when the entryman paid the purchase price. 43 C.F.R. § 2562.7. Normally, this final receipt was issued after the surveys of the land were completed and the patent had been approved. Id.

In a series of decisions, the IBLA has held that 43 U.S.C. § 1165 is not triggered unless the entryman, in addition to fulfilling the other requirements for a patent application, has paid the entire purchase price for the land and received the final receipt. See United States v. Jones, 106 I.B.L.A.

230, 264 (1988) (holding that the requirement the entryman pay the purchase price was a congressionally imposed condition for acquiring the right); Bunch, 64 I.B.L.A. at 330 (holding that the entrywoman was not entitled to a patent under 43 U.S.C. § 1165 because she had not received a final receiver's receipt after payment of the purchase price); United States v. Brannif, 65 I.B.L.A. 94 (1982)(holding that although the entryman paid his application fees and obtained receipts, he failed to obtain the final receipt for payment of the statutory purchase price); United States v. Boyd. 39 I.B.L.A. 321, 328-29 (1979)(holding that appellant failed to show any evidence that final payments had been made). In Bunch, 64 I.B.L.A. at 325, the Board explained that the first

two receipts that the entrywoman received did not "fall[] within the words of the statute" and absent payment of the purchase price and issuance of the final receipt, the two-year period of 43 U.S.C. § 1165 had not begun.

[7,8] Although the judiciary is the final arbiter of the issue of statutory construction, an administrative agency's interpretation of a statute it is charged with administering is accorded substantial deference. Haynes v. United States. 891 F.2d 235, 238-39 (9th Cir.1989). The statute at issue, 43 U.S.C. § 1165, is part of the acts that the Department of the Interior is charged with administering. See 43 U.S.C. §§ 1 and 1165 (historical notes). As a result, the decisions of the Interior Board of Land Appeals, a part of the

Department of the Interior, on the meaning of a "receipt upon final entry" for purposes of 43 U.S.C. § 1165 should be given substantial deference. Furthermore, to affirm we need not conclude that the agency's construction was the only one it permissibly could have adopted or even the reading we would have reached if the question initially had arisen in a judicial proceeding, but only that the agency's interpretation is reasonable and not contrary to congressional intent. Chevron U.S.A., 467 U.S. at 843 n. 11, 104 S.Ct. at 2782 n. 11.

Requiring payment of the purchase price before section 1165 is triggered is in keeping with the congressional purpose of avoiding delays between the time the entryman completes the patent

requirements and the agency adjudicates the final proof. In fact, it furthers this purpose by making sure all requirements are completed. Because the agency's interpretation of this term is reasonable and in keeping with the purpose of the statute as a whole, I conclude that a "receipt upon final entry" requires the entryman to pay the purchase price to trigger the two-year period under 43 U.S.C. § 1165. Thus, Brandt-Erichsen was required to pay the $2.50 per acre for the approximately 80 acres to obtain a final manager receipt. As the statute was not triggered, Brandt-Erichsen did not obtain equitable title to the land in question.

Because there are no genuine issues of material fact and the district court correctly applied 43 U.S.C. § 1165, the

grant of summary judgment should be affirmed.

B. Waiver.

[9] The appellees also argue that Brandt-Erichsen waived the issue of whether the Confirmation Statute was triggered by failing to raise this issue in the earlier administrative proceedings. While the appellees raised the waiver issue in their motion to dismiss and their reply brief in support of the motion to dismiss, the district court did not rely on waiver as a ground for granting the appellees' summary judgment motion. As the district court never reached the issue and the Confirmation Statute is dispositive in this case, I find it unnecessary to reach the waiver issue.

C. Attorney Fees.

[10] Brandt-Erichsen claims that he is entitled to attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. A plaintiff may be awarded attorney fees pursuant to the Equal Access to Justice Act, if he is a prevailing party and the position of the United States was not substantially justified. Petrone v. Secretary of Health & Human Serv., 936 F.2d 428, 429 (9th Cir.1991) cert denied. --U.S.--, 112 S.Ct. 1161, 117 L.Ed.2d 409 (1992). As Brandt-Erichsen was not the prevailing party, he is not entitled to attorney fees under this statute.

**AFFIRMED**

FERGUSON, Circuit Judge, specially concurring:

I concur in the conclusion reached by Judge Poole, but for a different reason. Viggo Thor Brandt-Erichsen has lost his right to assert that 43 U.S.C. § 1165 grants him equitable title because he failed to do so when he should have--a decade ago in an administrative proceeding before the Department of the Interior (DOI) acting in a judicial capacity. In that proceeding, DOI successfully contested Brandt-Erichsen's application to purchase an 80-acre tract of land as a trade and manufacturing site. Today, Brandt-Erichsen brings a quiet title action concerning that same tract, arguing that section 1165 should have barred DOI from contesting his claim. Because Brandt-Erichsen has waived his opportunity to rely on that statute, and also because he has failed

to show that he satisfies the requirements of that statute, the judgment of the district court should be affirmed.

In early 1979, DOI filed an administrative complaint contesting Brandt-Erichsen's 1973 application to purchase the parcel of land, which is situated within what is now Wrangell-St. Elias National Park and Preserve. Later that year, an administrative law judge found for DOI and canceled Brandt-Erichsen's entry because, at the time of his application, Brandt-Erichsen was not engaged in a business operation from which he could reasonably expect to derive a profit. DOI's Interior Board of Land Appeals affirmed. 46 I.B.L.A. 239 (March 27, 1980). Brandt-Erichsen did

not seek judicial review of that final agency action.

As a preliminary matter, Brandt-Erichsen can not rely on section 1165 because he has not shown he is in "full compliance with the [Homestead] law," which is required to trigger the running of section 1165's two-year statutory period. Stockley v. United States, 260 U.S. 532, 540, 43 S.Ct. 186, 67 L.Ed. 390 (1923). In final agency action, DOI canceled Brandt-Erichsen's entry, finding that the extremely limited revenue Brandt-Erichsen generated on the land during his prove-up period did not indicate that at the time of his application to purchase the land he was engaged in actual businesses from which he could expect to derive a profit. Brandt-Erichsen therefore failed to show

that he was "in possession of and occupying public lands ... for the purposes of trade, manufacture, or other productive industry," 43 U.S.C. § 687a. He has still made no such showing, notwithstanding the Notice and the Application he filed with DOI. Because he has not shown that he ever made a valid entry for the purpose of productive industry onto the land he now claims, he certainly has not shown that two years have passed since he was issued a receiver's receipt upon a final entry for such purposes.

Second, Brandt-Erichsen has waived any opportunity to take advantage of section 1165, even if it might otherwise apply. At no time in the agency proceedings ten years ago did Brandt-Erichsen claim that section 1165 barred

DOI from contesting his application based upon its failure to do so within two years of his procuring a receipt upon final entry.

Now, a decade later, Brandt-Erichsen brings this quiet title action, arguing that DOI should have been so barred. He offers no explanation of why he failed to raise the statute in the administrative proceedings, why he failed to seek judicial review, or why he failed to seek reconsideration. I can see no "exceptional circumstances" warranting our review at this stage. See Marathon Oil Co. v. United States, 807 F.2d 759, 757 (9th Cir.1986), cert. denied. 480 U.S. 940, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987). Although we should proceed with flexibility and caution when according preclusive effect to a failure to raise a

claim before an administrative agency acting in a judicial capacity, see United States v. Lasky, 600 F.2d 765, 768 (9th Cir.), cert denied, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979), I see no reason on the facts of this case for us to set aside the normal operation of claim preclusion.

An exceptional circumstance is asserted to exist because it would have been futile for Brandt-Erichsen to raise section 1165 before DOI ten years ago because its mind was set. First, what may retrospectively appear futile may not have appeared so--or been so--at the time. Of the four Interior Board of Land Appeals cases cited in support of this proposition, three, including the one with the most exhaustive discussion, were decided after the administrative

proceedings in this case. "The agency's interest[] in...correcting its own errors" is an important element in deciding whether exceptional circumstances exist warranting our review. Marathon Oil, 807 F.2d at 768. The futility argument may have had some validity if Brandt-Erichsen had sought judicial review of the final agency action ten years ago without having raised the claim in the agency proceedings. However, to raise it now, in a collateral proceedings ten years later, involves too much speculation with insufficient foundation.

Moreover, Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496 9th Cir.1980) cannot justify futility as an exceptional circumstance in this case. Andrus involved the failure to exhaust

administrative remedies, rather than the failure to assert a claim in an administrative proceeding that actually occurred and was not appealed. Furthermore, in Andrus we excused failure to exhaust administrative remedies not only because it would have been futile, but also because 1) the administrative remedies available were inadequate and 2) the administrative forums available to the claimant were "legally foreclosed from overruling the Secretary's position." Andrus. 648 F.2d at 500-501. Those conditions do not exist in this case.

In sum, I concur because I fail to see why we should reach out to allow a party to establish a lumbering business and hunting lodge on National Park and Preserve Land on the basis of a statute

for which he has failed to prove he qualifies, and which he could and should have attempted to rely upon ten years ago.

HUG, Circuit Judge, dissenting:

I respectfully dissent. I would reverse the district court's decision to grant summary judgment in favor of appellees because the district court erred in determining that Brandt-Erichsen failed to obtain a "receipt upon final entry" for purposes of 43 U.S.C. § 1165 (1988).

## I. The Statutes

As we observed in Grewell v. Watt, 664 F.2d 1380 (9th Cir.1982), both the statute under which Brandt-Erichsen claims his site, 43 U.S.C. § 687a (1982)

(repealed effective 1986)[5], and the statute which he argues barred the BLM's contest after two years, 43 U.S.C. § 1165, had their genesis in an 1891 congressional act entitled "An Act to Repeal timber-culture laws, and for other purposes," Ch. 561, 26 Stat. 1095 (1891)("the 1891 Act"). See id. at 1382. Section 1 of the 1891 Act contained provisions dealing with claims based on the occupation of Alaska lands "for the purpose of trade or manufactures." Id.

A. 43 U.S.C. § 687a

Section 12 of the 1891 Act contained the original version of what became 43

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[5] The statute 43 U.S.C. § 687a was repealed effective October 21, 1986 by the Federal Land Policy and Management Act of 1976, Pub.L. No. 94-579, § 703(a), 90 Stat. 2743, 2789-91 (1976). It was in effect, however, during all of the events relevant to this case.

U.S.C. § 687a. This section described who was entitled to claim land under the Act:

> [A]ny citizen of the United States...in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre...

Ch. 561, 26 Stat. 1100 (1891). Section 13 set out the process by which persons entitled to claim such land could do so:

> [I]t shall be the duty of any person...entitled to purchase land under this act to make an application to the United States marshal, ex officio surveyor-general of Alaska, for an estimate of the cost of making a survey of the lands occupied by such person...and the cost of the clerical work necessary to be done in the office of the said United States marshal, ex officio surveyor-general; and on the receipt of such estimate from the United States marshal, ex officio surveyor-

general, the said person...shall deposit the amount in a United States depository, as is required by section numbered twenty-four hundred and one, Revised Statutes, relating to deposits for surveys.

That on the receipt by the United States marshal, ex officio surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior or, who shall make his return of his field notes and maps to the office of the said United States marshal, ex-officio surveyor-general; and the said United States marshal, ex officio surveyor-general, shall cause the said field notes and plats of such survey to be examined, and, if correct, approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

That when the said field notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person...who shall then, within six months after such notice, pay to the said United States marshal ex

officio surveyor-general, for such land, and patent shall issue for the same.

Ch. 561 26 Stat. 1100 (1891)(emphasis added).

Contrary to Judge Poole's determination, I conclude that the statutory language makes Congress' intent clear. When it enacted the 1891 Act. Congress intended that an eligible claimant would pay the purchase price of such land only after a survey had been conducted and approved by the Commissioner of the General Land Office.[6] Furthermore, Congress granted such a claimant an additional six months after notification of the Commissioner's

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[6] In 1946, Congress abolished the General Land Office and the offices of Commissioner of the General Land Office and transferred their functions to the newly created BLM. Reorganization Plan No. 3 of 1946, § 403, 60 Stat. 1097, 1100 (1946).

approval of a survey in which to tender the purchase price of the land.

In 1898, Congress enacted another statute entitled "An Act Extending the homestead laws and providing for right of way of railroads in the District of Alaska, and for other purposes," Ch. 299, 30 Stat. 409 (1898) ("the 1898 Act"). Section 10 provides, in pertinent part:

> [A]ny citizen of the United States...in the possession of and occupying public lands in the District of Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person...at two dollars and fifty cents per acre, upon

> submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry...

Ch. 299, 30 Stat. 413 (1898). "Th[is] language is so similar to the language of the 1891 Act that we can only conclude that the genesis of the 1898 language was the 1891 Act itself." Grewell, 664 F.2d at 1383. Moreover, the 1898 Act "specifically recognize[s] the validity of claims theretofore made under the 1891 Act, it does not purport to repeal the

1891 Act." Id.[7]

The 1898 Act contained no reference to payment of the purchase price as a step in the process through which persons entitled to claim such land could acquire it. "From this we infer that the language, already in effect, was deemed sufficient to meet 1898 needs." Id. We also infer that Congress intended to retain the land claims process articulated in section 13 of the 1891 Act. Had Congress intended to modify this process to require eligible claimants to tender the purchase price prior to completion and approval of a

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[7] Section 10 of the 1898 Act further provides: "That all claims substantially square in form and lawfully initiated, prior to January twenty-first 1891 [the 1891 Act], may be perfected and patented upon compliance with the provisions of said Act, but subject to the requirements and provisions of this Act..." Ch. 299, 30 Stat. 413 (1898).

survey, "surely Congress would have manifested that intent more clearly." Id. at 1383-84.

The language of the 1898 Act, with minor irrelevant changes, appears now as 43 U.S.C. § 687a. Moreover, the process by which persons entitled to claim such land may acquire it remains basically unchanged. See 43 C.F.R. §§ 2562.1-2562.7 (1992). Most notably, current BLM regulations require an eligible claimant to pay the purchase price of the land only after a survey has been conducted and proofs approved. 43 C.F.R. § 2562.7.

In this case, Brandt-Erichsen filed a Notice of Location of Settlement or Occupancy Claim and submitted the required fee in accordance with 43 C.F.R. § 2562.1. He also filed an Application

to Purchase Trade and Manufacturing Site and Petition for Survey along with the required fee in accordance with 43 C.F.R. §§ 2562.3, 2562.4. Brandt-Erichsen received receipts for the payments. The next step in the process was the completion of a survey by the Government. See 43 C.F.R. § 2563.4. Brandt-Erichsen was not required to tender the purchase price of the land until after the survey had been conducted and approved. See 43 C.F.R. §2562.7.

B. 43 U.S.C. § 1165

The Supreme Court's decision in Stockley v. United States, 260 U.S. 532, 43 S.Ct. 186, 67 L.Ed. 390 (1923), confirms my interpretation of this land claims process. In Stockley, the Supreme Court focused its attention on section 7

of the 1891 Act, which is codified at 43 U.S.C. § 1165. Section 7 is now known as the "Confirmation Statute," and it is the statute upon which Brandt-Erichsen relies to argue that the BLM's contest was barred.

Section 7 of the 1891 Act provided:

> That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him....

Ch. 561, 26 Stat. 1099 (1891) (emphasis added).

In Stockley, the Supreme Court concluded that the entryman was entitled to a receiver's receipt once he had complied with the provisions of the homestead laws, submitted final proof, and paid the commissions and fees then

due. 260 U.S. at 540, 43 S.Ct. at 188. The receiver's receipt that the entryman had been issued showed that he had paid $3.01 for 71.25 acres of land, and not the purchase price of $89.06.[8] See id. at 536-37, 43 S.Ct. at 186-87. The entryman in Stockley did not pay the purchase price.

The Supreme Court proceeded to conclude that once the receiver's receipt issued, section 7 of the 1891 Act was implicated, and the two-year time period within which the Government could contest the claim began to run. Id. at 539-40, 43 S.Ct. at 187-88. The Court expressly rejected the Government's contention that Stockley's receipt "obtain[ed] no validity as a 'receiver's receipt upon the final entry' until after the proof ha[d] in fact been examined and approved." Id. at 539, 43 S.Ct. at 188.

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[8] A complete version of the receipt appears in the Court of Appeals' decision in the case: "[I]n connection with Pd. Final, Serial No. 1088, for [describing land] 71.25 acres at 1.25 per acre,

$_____

Fees

| | |
|---|---|
| Commissions | $1.76 |
| Testimony fees, etc. | 1.25 |
| | $3.01 |
| Less com's suspended in official mys.(money) | 1.76 |
| | $1.25 |

"C.J. Greene, Receiver of Public Moneys." Stockley v. United States, 271 F. 632, 634 (5th Cir. 1921).

Because the Commissioner of the General Land Office waited more than three years after the issuance of the receiver's receipt to contest the entryman's claim, the Supreme Court held that full equitable title had vested in the entryman, and he had become entitled to a patent by virtue of section 7 of the 1891 Act. Id. at 544, 43 S.Ct. at 189.

Like the entryman in Stockley, Brandt-Erichsen filed the appropriate documents and paid the fees lawfully due, but he did not tender the purchase price. Moreover, Brandt-Erichsen received receipts for the fees submitted. The only steps left in the process were the Government's completion and approval of a survey of the land and, thereafter, Brandt-Erichsen's payment of the purchase price. See 43 C.F.R. §§ 2562.4, 2562.7 (1992). The Government waited more than five years after Brandt-Erichsen received a receipt for payment of the fee accompanying his Application to Purchase Trade and Manufacturing Site to contest his claim. Thus, Brandt-Erichsen is entitled to a patent conveying the land by virtue of 43 U.S.C. § 1165. See Stockley, 260 U.S. at 544, 43 S.Ct. at 189; Grewell, 664 F.2d at 1382.

Appellees argue that we should defer to the agency's interpretation of the Confirmation Statute. Appellees look to United States v. Jones, 106 I.B.L.A. 230 (1988); United States v. Braniff, 65

I.B.L.A. 94 (1982); United States v Bunch, 64 I.B.L.A. 318 (1982); United States v. Boyd, 39 I.B.L.A. 321 (1979), for the proposition that the two-year period referred to in 43 U.S.C. § 1165 does not begin to run until a claimant has tendered or paid the purchase price.

Although these decisions embrace appellees' interpretation of 43 U.S.C. § 1165, the Interior Board of Land Appeals misconstrued the plain language of the statute to reach them. In Bunch, which contains the Board's most exhaustive discussion of this issue, the Board incorrectly emphasized the finality of payment rather than the finality of entry. See 64 I.B.L.A. at 324. In fact, the Board repeatedly referred to the "final receipt of the receiver" rather than the "receiver's receipt upon the final entry" (26 Stat. 1099) or "the receipt of such officer as the Secretary of the Interior may designate upon the final entry" (42 U.S.C. § 1165). See id. The Board concluded that because Bunch had not paid or tendered the purchase price, "nothing which could be considered a 'final receipt' ha[d] issued to her or [was] due her." Id.

In contrast, the Stockley Court carefully analyzed the term "final entry" in an effort to determine whether the receipt issued to the entryman fell within the meaning of the statute. See 260 U.S. at 539-40, 43 S.Ct. at 187-88.

Despite the fact that the entryman had not tendered the purchase price, the Supreme Court concluded that he "did, in fact, make final entry and the receiver did, in fact, issue and deliver his receipt thereon." Id. at 542, 43 S.Ct. at 189. Thus, the Board's decisions are in direct conflict with the Supreme Court's decision in Stockley.

In Bunch, the Board noted that "because the amount of land in the claim cannot be ascertained without a survey, it would not have been possible for (Bunch) to pay the correct amount, or for the officer designated to issue a receipt evincing final payment, until the number of acres in the claim was known." 641 I.B.L.A. at 325. Contrary to the Board's contention, this observation lends support to my interpretation of 43 U.S.C. § 1165. Once a claimant has filed the appropriate documents and submitted the fees then due in an effort to acquire unsurveyed land, he must wait for the Government to conduct and approve a survey before he may tender the purchase price, and he must tender the purchase price before he can get what the Board characterizes as the "final receipt." To require the claimant to obtain such a "final receipt" before the two-year period described in 43 U.S.C. § 1165 begins to run would frustrate the purpose of the statute--to avoid delays for an unreasonable length of time, that is,

more than two years. See Stockley, 260 U.S. at 540-41, 43 S.Ct. at 188.

That is precisely the situation with which we are presently faced. Brandt-Erichsen filed an Application to Purchase Trade and Manufacturing Site and paid the required application fee on August 6, 1973. The BLM waited until January 18, 1979, more than five years later, to file an administrative complaint contesting Brandt-Erichsen's request for a patent on the property. Under appellees' interpretation of 43 U.S.C. § 1165, the BLM's conduct in this case must be approved. Such an outcome is contrary to the expressed intent of Congress.

Although the agency's interpretation of the statute is entitled to deference, see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984), it need not be followed if it appears from the statute or its legislative history that the interpretation is not one that Congress would have sanctioned. "When Congress has plainly described the instrument from whose date the statute begins to run as the 'receipt upon the final entry,' there is no warrant for construing it to mean only a receipt issued simultaneously with the certificate or one issued after the adjudication on the final proof, which

might be--and in this instance was--postponed indefinitely." Stockley, 260 U.S. at 540, 43 S.Ct. at 188. Thus, appellees' reading of the statute is not one that Congress would have sanctioned.

I conclude that the district court incorrectly applied the relevant substantive law. Thus, I would reverse the district court's decision to grant summary judgment in favor of appellees. See FDIC v. O'Melveny & Myers, 696 F.2d 744, 747 (9th Cir.1992); Tzung v. State Farm Fire & Casualty Co., 873 F.2d 1338,1339-40 (9th Cir.1989).

## II. Waiver

Appellees also argue that Brandt-Erichsen waived his argument based upon the Confirmation Statute by failing to raise it during the administrative proceedings before the agency. Generally, we will not consider issues not presented before an administrative proceeding at the appropriate time. Marathon Oil Co. v. United States, 807 F.2d 759, 767 (9th Cir.1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987). However, we may "decide issues over which an agency has power and jurisdiction when 'exceptional circumstances' warrant such review, notwithstanding the petitioner's failure to present them to the agency." Id. at 768 (quoting Reid v. Engen, 765 F.2d 1457, 1461 (9th Cir. 1985).

In the absence of a statute expressly requiring that the Confirmation Statute argument must be raised before the agency, we must balance "the agency's interests 'in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances.'" Id. (quoting Litton Indus, Inc. v. FTC, 676 F.2d 364, 369-70 (9th Cir.1982). I conclude that Brandt-Erichsen was not required to raise this argument before the agency as it would have been futile for him to do so.

Contrary to appellees' contention, Brandt-Erichsen's failure to raise this argument during the administrative proceedings did not preclude the agency from interpreting 43 U.S.C. § 1165 and related regulations. In the words of appellees, "the Department of Interior (DOI) has consistently held that, with respect to the purchase of public lands in Alaska, the two-year limitation does not begin to run until the claimant has tendered the purchase price in accordance with the Alaska Act, 43 U.S.C. § 687a." Appellee's Brief at 9. The decisions of the Interior Board of Land Appeals are consistent with DOI's interpretation. See Jones, 106 I.B.L.A. at 264-66; Braniff, 65 I.B.L.A. at 97-98; Bunch, 64

I.B.L.A. at 324-25' Boyd, 39 I.B.L.A. at 328-29. As a practical matter, the agency's established position renders administrative review of this issue meaningless. See Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 500-01 (9th Cir.1980).

Because it would have been futile for Brandt-Erichsen to raise the Confirmation Statute argument before the agency, I conclude that exceptional circumstances justify our consideration of this issue.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| VIGGO THOR BRANDT-ERICHSEN, Plaintiff-Appellant, | ) | No. 91-35835 |
| v. | ) | D.C.No. CV-A89-183-AJK |
| UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT; UNITED STATES DEPARTMENT OF INTERIOR, NATIONAL PARKS SERVICE; MANUEL LUJAN, in his official capacity as Secretary of Interior; CHARLES BUDGE, in his official capacity as Superintendent of the Wrangell-St. Elias National Park; RICHARD H. MARTIN, in his official capacity as Superintendent of the Wrangell-St. Elias National Park; WILLIAM P. HORN, Deputy Secretary of the Department of Interior in his official capacity; JOHN TIFFANY, Inspector for the Bureau of Land Management, Glennallen Detachment in his official capacity; STUART HIRSCH, Inspector for the Bureau of Land Management | ) | ORDER |

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| in his official capacity | ) |
| | ) |
| Defendants-Appellees. | ) |
| | ) |

Before: HUG, POOLE and FERGUSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.